BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF CHESAPEAKE UTILITIES CORPORATION REGARDING ITS ACQUISITION AND CONVERSION OF PROPANE COMMUNITY GAS SYSTEMS (Filed June 29, 2018)	))))))	**PSC Docket No. 18-0933**

RESPONSE OF THE DELAWARE ASSOCIATION OF ALTERNATIVE ENERGY PROVIDERS, THE MID-ATLANTIC PROPANE GAS ASSOCIATION, AND THE MID-ATLANTIC PETROLEUM DISTRIBUTORS ASSOCIATION TO THE MOTION TO STRIKE THEIR PUBLIC COMMENTS FILED BY CHESAPEAKE UTILITIES CORPORATION

The Delaware Association of Alternative Energy Providers, the Mid-Atlantic Propane Gas Association, and the Mid-Atlantic Petroleum Distributors Association ("Associations") respectfully submit this response to Chesapeake Utilities Corporation's ("CUC") motion to strike their public comments.

Introduction

As an initial matter, counsel for the Associations agrees that CUC's counsel could have been given more of a heads-up that the Associations would be filing public comments. While any additional notice may have only involved an additional day or so, the Associations' counsel could have extended that professional courtesy. The Associations' counsel has contacted counsel for the

CUC and committed to work cooperatively to increase their level of communication.

CUC's Motion to Strike Should Be Denied.

CUC's argument is almost entirely premised upon its misreading of 26 *Del. C.* § 201(a), the statute that identifies the Commission's general jurisdiction. CUC's incorrect interpretation of § 201(a) was presented to and erroneously adopted by the Delaware Superior Court in *Chesapeake Utilities Corp. v. Delaware Public Service Commission,* C.A. No. K17A-01-001 WLW (Del. Super., June 7 2017, Witham, J. ("CUC Order").

Section 201(a) provides:

> (a) The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title. Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility, and, in so regulating, the Commission shall consider the interests of subscribers, if any, of the entity attaching to the public utility's facility, as well as the interests of the consumer of the public utility service.

Section 201(a) consists of two sentences. CUC takes the qualifying language toward the end of the second sentence, and mistakenly argues that it modifies the first sentence of Section 201(a), when it plainly does not. CUC compounds its error, by misinterpreting the qualifying language in the second

sentence as placing a limitation on the Commission's jurisdiction, when no such intention can be read into the statute.

The first sentence of Section 201(a) is very broad in scope, which is evident from its plain language, which bears repeating:

> The Commission *shall* have *exclusive original supervision and regulation* of *all public utilities* and also over their rates, property rights, equipment, facilities, service territories and franchises *so far as may be necessary for the purpose of carrying out the provisions of this title.* (Emphasis added).

Thus, the Commission's jurisdiction is both exclusive and original. And the Commission is charged with exercising both supervisory and regulatory authority over public utilities as far as the Commission deems it necessary to carry out the provisions of Title 26. This is a broad mandate.

The second sentence of Section 201(a) reads:

> Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility, and, in so regulating, the Commission shall consider the interests of subscribers, if any, of the entity attaching to the public utility's facility, as well as the interests of the consumer of the public utility service.

The language in the second sentence of 201(a) refers to jurisdiction over a public utility's rates, but only in relation to the "terms and conditions for any attachment … to any pole, duct, conduit, right-of-way or other facility of any public utility…." In short, the second sentence of Section 201(a) is independent of

the first sentence, and is only meant to apply to the subject of rates as they specifically relate to attachments to poles, rights-of-way, and other facilities. Nothing in the second sentence is intended, as a plain matter of English grammar, to modify the first sentence of Section 201(a). Indeed, the term "rates" is used in the first sentence of 201(a) largely without limitation. Plainly then, the second sentence of Section 201(a) can only relate to the rates for "attachments." No other reasonable interpretation is possible.

The second sentence of Section 201(a) only applies to the Commission's jurisdiction over attachments to poles and other facilities. With that in mind, one can then determine the meaning and application of the second part of the second sentence of Section 201(a) beginning with the words "and, in so regulating [the rates for attachments], the Commission shall consider the interests of subscribers, if any, of the entity attaching to the public utility's facility, as well as the interests of the consumer of the public utility service." The latter phrase plainly modifies the words "attachment … to any pole, duct, conduit, right-of-way or other facility of any public utility…." Therefore, the supposed limitation to the "consumer" does not apply to the Commission's general jurisdiction as stated in the first sentence of Section 201(a). It only applies to the subject of "attachments" as the term in used in Section 201(a).

And there is another obvious and perhaps more important reason why CUC's interpretation of Section 201(a) is clearly wrong. CUC directs the Commission to focus upon the words "the Commission shall consider the interests of subscribers, if any, of the entity attaching to the public utilities to the public utility's facility, as well as the interests of the consumer of the public utility service." CUC's interpretation of the statute is wrong, because the sentence does not contain the word "only." CUC tells the Commission that it must interpret the second sentence of Section 201(a), as if it contains the word "only" and reads:

> Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility, and, in so regulating, the Commission shall ***ONLY*** consider the interests of subscribers, if any, of the entity attaching to the public utility's facility, as well as the interests of the consumer of the public utility service.

The word "only" was obviously omitted from Section 201(a) by the Delaware General Assembly when it enacted the provision. To read the word "only" into the statute, when it does not appear, violates the most basic principles governing statutory interpretation.

The second sentence of Section 201(a) tells the Commission what it shall consider when dealing with the subject of attachments, namely, that it shall consider the interests of subscribers and consumers. In doing so, it does not tell the Commission that it is only empowered to consider those interests and nothing

more. CUC's interpretation of Section 201(a) is plainly wrong. The statute in no way limits the Commission's jurisdiction to consider other factors or other interests.

The CUC Order incorrectly concluded that the Delaware Association of Alternative Energy Providers ("DAAEP") could not, as a matter of law, intervene in the CUC proceeding at issue there, because the DAAEP and its members did not fall within the meaning of "the consumer of the public utility service" in the second sentence of Section 201(a). However, as the Associations established above, the term "the consumer of the public utility service" in the second sentence of Section 201(a) does not place a limitation on the Commission's jurisdiction. Therefore, the Commission did not, as the Court asserted: "administer … its [intervention] rule in such a way as to extend its jurisdiction to areas not contemplated by the statute." *Id*. at 9.

The CUC Order, itself, cites only to the decision in *Delmarva Power & Light Co. v. City of Seaford*, 575 A.2d 1089 (Del. 1990). Respectfully, the *City of Seaford* case does not stand for the proposition for which the Court cited it. In *City of Seaford*, the Delaware Supreme Court held that, because Delmarva had a non-exclusive franchise over certain service territory, it was entitled to compensation from Seaford when the city annexed part of Delmarva's service territory. The Commission was not a party. The decision did not interpret Section 201(a), but

rather a prior version of Section 203A, which dealt with certificates of public convenience and necessity ("CPCN"). And in discussing the Commission's jurisdiction over such certificates, the Supreme Court cited with apparent approval a Commission decision in the CPCN context and the regulation of service territories, that the Commission could consider "the convenience and necessity of the public as a whole…." *Id*. at 1097.

The CUC Order concludes: "The Commission has no statutory authority to consider the competitive interests of unregulated providers in a rate proceeding." *Id*. at 17. Although the conclusion is incorrect, the CUC Order equates a Commission decision to allow intervention with a decision to protect the competitive interests of unregulated providers. When it allows intervention, the Commission merely signifies that it will hear from such providers and take their input for what it is worth. Whether the Commission's final decision considers and protects the interests of such providers is for another day.

Much of the rationale behind the CUC Order is similarly flawed. For example, the Court expressed particular concern over the costs associated with allowing a competitive provider to intervene. However, the Commission has broad authority to limit the role of an intervenor to eliminate or minimize any burden or expense.

CUC is engaged in a sustained effort to prevent alternative energy providers in Delaware from providing any input in Public Service Commission proceedings, even in this case, where it can substantially affect their businesses, their employees, their customers, and the energy consuming public. The Associations respectfully submit that it is critically important -- and sound public policy -- for the Commission to allow their intervention liberally. The Commission has authority over an intervenor's level of participation. And the Commission has the expertise to address the complex and oftentimes novel issues that arise in public utility proceedings. Obviously, if the Associations are blocked from participating before the Commission, they may find themselves essentially compelled to address matters affecting them in collateral court proceedings, which will likely be more involved and far more expensive for the public utility. And it is the Commission, not the courts, which has developed the recognized expertise in public utility law and practice.

The Associations note that, at the core of this jurisdictional dispute, is the question whether CUC, as a public utility, can use Commission proceedings in ways that affect the Associations, their members, employees, and customers, and at the same time, block the Associations' participation. Plainly the circumstances are untenable. CUC should not be permitted to use a Commission proceeding offensively, to gain competitive and other advantages, and preclude those affected

from having a voice. Such a conclusion would be at odds with sound public policy.

Motions to strike are not favored, are granted sparingly, and then only if clearly warranted, with doubt resolved in favor of the pleading. *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 660 (Del. Super. 1985). As the moving party, CUC bears the burden of proof. The Associations respectfully submit that, under all of the circumstances presented here, including the significant, contested, novel issues at stake, the Commission should exercise its discretion to deny CUC's motion to strike.

MURPHY & LANDON

/s/ Francis J. Murphy
Francis J. Murphy, Esq. DE Bar ID #223
1011 Centre Road, Suite 210
Wilmington, DE 19805
Telephone: (302) 472-8100
Email: fmurphy@msllaw.com
Attorneys for the Delaware Association of Alternative Entergy Providers; the Mid-Atlantic Propane Gas Association; and the Mid-Atlantic Petroleum Distributors Association

Dated: November 5, 2018